NO. 82128-3

SUPREME COURT OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Petitioner,

v.

ROBERT O'NEEL, et al.,

Respondents.

RESPONDENTS' RESPONSE TO BRIEF OF AMICI AMERICAN CIVIL LIBERTIES UNION, COLUMBIA LEGAL SERVICES, NORTHWEST WOMEN'S LAW CENTER, AND UNIVERSITY LEGAL ASSISTANCE

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I. INTRODUCTION

This matter is still in the pleading stages of litigation. The Court of Appeals reversed the superior court's dismissal of Mr. Parmelee's complaint under CR 12(c) and remanded it for further proceedings. *See Parmelee v. O'Neel*, 145 Wn. App. 223, 249, 186 P.3d 1094 (2008). CP 684-828. No court has determined that Mr. Parmelee's rights have actually been violated. Mr. Parmelee has not prevailed on the merits of his civil rights claims.

The case law is well settled. Under the Prison Litigation Reform Act, attorneys fees may only be awarded after the court has ruled that the prisoner's rights were actually violated, and that the rights were protected by a statute pursuant to which attorney's fees may be awarded under 42 U.S.C. §1988. 42 U.S.C. §1997e (d)(1)(A). [1] Neither the superior court nor the Court of Appeals ruled on the merits of Mr. Parmelee's claims. As the state and federal cases cited by the amici uniformly and conclusively state, attorneys fees simply are not available prior to a court ruling on the merits.

Given the overwhelming clear state and federal case law, there is no issue presented meriting review under RAP 13.4(b).

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[1] The text of 42 U.S.C. §1997e(d) is set forth in the Appendix.

II. ARGUMENT IN RESPONSE TO AMICI

A. The Court of Appeals Decision is Consistent with Well Settled Law Requiring a Determination That The Prisoner's Rights Have Been Actually Violated

Amici erroneously argue that Mr. Parmelee is "presumptively entitled" to attorney fees. Brief of Amici at 2 (citing 42 U.S.C. §1988 and *American Broadcasting Co., v. Miller*, 550 F. 3d 786 (9th Cir. 2008) (a non-prisoner case)). This argument fails because no court has determined that Mr. Parmelee's rights have been violated under the Prisoner Litigation Reform Act, codified in part in 42 U.S.C. §1997e(d)(1)(A). [2] Under this statute, Mr. Parmelee bears the burden of proving that his claimed fees were "directly and reasonably incurred in *proving an actual violation of*

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[2] The First Circuit discussed the history and policy behind the Prison Litigation Reform Act's limitations on attorney fees as follows:

> In the American civil justice system, the spoils that belong to the victor ordinarily do not include payment of attorneys' fees. Except when a statute or an enforceable contractual provision dictates otherwise, litigants generally pay their own way. Congress has the power, however, to revise this schematic, and if it elects to do so, it may delineate both the circumstances under which attorneys' fees are to be shifted and the extent of the courts' discretion in that respect. Furthermore, this power may be exercised selectively, that is to say, Congress may pick and choose among its statutes and allow attorneys' fees under some, but not others. In perhaps the most striking use of this power to date-the Fees Act, adopted in 1976-Congress gave the courts discretion to award reasonable attorneys' fees to prevailing civil rights litigants. Congress later enacted other statutes that hewed roughly to this prototype. In enacting the [Prison Litigation Reform Act], Congress deviated from this pattern, choosing to place some explicit limitations on the fees that courts can award to prisoners' lawyers in civil cases . . .

Boivin v. Black, 225 F.3d 36, 39 (1st Cir. 2000) (citations and inner quotes omitted)

the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 . . ." *Id* (emphasis added). Here, the Court of Appeals did not err in rejecting Mr. Parmelee's claim for attorney fees at this time because such an award must be predicated on the determination that a prisoner's rights have been actually violated. No such determination has been made in this case. Nor do amici present any argument or analysis under §1997e(d) that any court has determined that Mr. Parmelee's rights were actually violated. Consequently, the Court of Appeals' decision was not "reversible error" to deny Mr. Parmelee's request for attorney fees "without identifying special circumstances." Brief of Amici at 2-3.[3] Rather, the Court of Appeals' decision was completely consistent with controlling law.

Here, the remand to the trial court for determinations on the merits, overturning a dismissal for failure to state a claim, is a procedural decision that does not entitled the prisoner to attorney fees. A court must determine the merits of his claims, and an actual violation before it has authority to order payment of attorney fees. The Court of Appeals recognized that Mr. Parmelee raised a number of constitutional claims in his Complaint that

[3] Both of the cases cited here by amici in support of their claim for a presumptive entitlement to attorney fees under 42 U.S.C. §1988 are non-prisoner cases where the courts determined, unlike here, that the plaintiffs' rights were violated. *See Torres-Rivera v. O'Neill-Cancel*, 524 F.3d 331, 341 (1st Cir. 2008); and *Borunda v. Richmond*, 885 F.2d 1384, 1392 (9th Cir. 1988).

had not been determined as actual violations in the appeal. Specifically, the Court of Appeals found:

> [E]ven if we wanted to address whether the statutes are unconstitutional as applied to Parmelee, the record is insufficient to properly decide this issue. *Thus, we cannot address whether Washington's criminal libel statutory scheme is unconstitutional as applied to Parmelee in this case. Likewise, we cannot address whether Parmelee's freedom of speech or substantive due process rights were violated because the record is insufficient to make those determinations.* Nor do we address whether procedural due process was violated because Parmelee abandoned that claim at oral argument.

Parmelee v. O'Neel, 145 Wn. App. at 223 (emphasis added).

The Court of Appeals remanded the matter for further proceedings in the trial court to allow Mr. Parmelee to "raise his claims for damages against DOC for violating his First Amendment rights, violating substantive due process, and retaliating against him". *Parmelee*, 145 Wn. App. at 249. Adjudication of the merits of Mr. Parmelee's claims must be made before attorney fees can be granted. That has yet to occur.[4]

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[4] Amici's arguments for attorney fees also fail under the provisions of §1997e (d) directing how a prison inmate may be allocated attorneys fees as a prevailing party. 42 U.S.C. §1997e(d). The award of attorney fees in prisoner civil rights damages cases is contingent upon the offender showing his civil rights were actually violated. *Id.* The statute also requires that twenty-five percent of any damages award be applied towards attorney fees and any payment of fees is limited to 150 percent of the government rate for attorneys. 42 U.S.C. §1997e(d)(2). In cases involved monetary judgment and injunctive judgments, the award of attorney's fees may be more than the cap in the statute, but the trial court has to determine if the fees are warranted in light of the degree of success on the merits. *Dannenberg v. Valadez*, 338 F. 3d 1070, 1075 (9th Cir. 2003). The fees are awarded if the party requesting them has shown that they were directly and reasonably spent in proving the plaintiff's rights were violated. *Id.*

Amici and Mr. Parmelee have not demonstrated under 42 U.S.C. §1997e(d) any foundation justifying an award of attorney fees. Mr. Parmelee did not present any argument that he was a prevailing party or that the fees he was seeking were reasonably incurred to prove an actual violation of his rights or that his rights were actually violated. *Id.* Nor did the Court of Appeals hold the Department violated Mr. Parmelee's rights. *Parmelee*, 145 Wn.2d at 243. As noted above, the Court of Appeals stated that determinations regarding his rights are remanded to the superior court. Based on the record before it, the Court of Appeals could not determine if the criminal libel statute, RCW 9.58.010, as applied to Mr. Parmelee through the prison disciplinary code, was unconstitutional. Nor did the Court of Appeals determine whether Mr. Parmelee's First or Fifth Amendment rights were violated, or whether any of the named defendants retaliated against him. In the absence of any such determinations, an award of attorneys is improper under 42 U.S.C. §1997e(d). The Court of Appeals' denial of Mr. Parmelee's premature request for attorney fees is consistent with controlling law.

B. The Court of Appeals' Decision is Consistent With Controlling Law Because Mr. Parmelee Did not Become a Prevailing Party

Amici argue that Mr. Parmelee is entitled to attorney fees because he is "presumptively entitled" to them pursuant to 42. U.S.C. §1988. Brief

of Amici at 2-3. They argue that because the statute relied upon for finding him guilty of a prison infraction was found to be unconstitutional on appeal, he is entitled to attorney fees for the appeal. This argument fails because Mr. Parmelee has not been determined to be a substantially prevailing party; this determination must be made first. *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S. Ct. 566, 121 L.Ed.2d 494 (1992).[5]

Amici fails to distinguish this case from *Farrar* and *Hewitt v Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). *See* Brief of Amici at 6, n. 2. Both *Hewitt* and *Farrar*, cases that precede the Prison Litigation Reform Act, support the Court of Appeals' decision here. As amici points out, the plaintiff in *Hewitt* "merely obtained an interlocutory ruling that his complaint should not have been dismissed for failure to state a claim." Brief of Amici at 6, n. 2. That is exactly what occurred here. Under *Farrar*, Mr. Parmelee has obtained no actual relief. *Farrar* is distinguishable (especially in light of the Prison Litigation Reform Act) because here, unlike in *Farrar*, there has been no determination that his rights have been violated.

[5] A party is entitled to attorney fees when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff" making him a "prevailing party". *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 664, 935 P.2d 555 (1997) (*citing Farrar*, 506 U.S. at 111-12).

Amici erroneously assert that Mr. Parmelee obtained substantial relief by "vacating his infraction and holding that the criminal libel statute is unconstitutional". Amici Brief at 6, fn. 2. Amici's assertion is belied by the numerous undetermined allegations and claims in Mr. Parmelee's lengthy complaint, as well as the denials and affirmative defenses asserted in response to those claims. CP 684-828, 496-509.

Amici cite *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S. Ct. 1987, 64 L.Ed.2d 670 (1980), a non-prisoner case, for the proposition that attorneys fees are appropriate when the requesting party is entitled "to some relief on the merits of his claims". Brief of Amici at 4-5. Amici did not include the following quote from the Supreme Court in *Hanrahan* that civil rights plaintiffs seeking attorneys fees must still prevail on their claims:

> The respondents have of course not prevailed on the merits of any of their claims. The Court of Appeals held only that the respondents were entitled to a trial of their cause. As a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. If the jury should not do so on remand in these cases, it could not seriously be contended that the respondents had prevailed. Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions, which affected only the extent of discovery. As is true of other procedural or evidentiary rulings, these determinations may affect the disposition on the merits, but were themselves not matters

> on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under §1988.

Id at 758-759 (footnote and citations omitted).

Amici erroneously mischaracterize the Court of Appeals decision in this case as an injunction, arguing as if the Court of Appeals prevented the Department from infracting Mr. Parmelee for the same behavior that resulted in his earlier infraction. Brief of Amici at 7 (referring to the Court's decision as an injunction and claiming that the issuance of an injunction is sufficient to be granted attorneys fees). The Court of Appeals decision did no such thing. At best, the Court's decision only pertained to the Department's use of the criminal libel statute when infracting him for his behavior. *Parmelee*, 145 Wn. App. at 245-246.

In any event, the grant of an injunction alone is not sufficient grounds for an award of attorney fees. "[O]btaining equitable relief does not automatically confer prevailing party status for purposes of the Fees Act." *G.O.A.L. v. Puerto Rico*, 247 F. 3d 288, 293 (1st Cir. 2001). The court must still make a "qualitative inquiry into the import of the relief obtained". *Id.* The court must distinguish between that which is "purely technical or de minimis" from that which is "meaningful." *Id.* In *G.O.A.L.*, an association of gay police officers sought attorney fees after obtaining declaratory and injunctive relief reversing a police department

regulation barring officers from associating with homosexuals. *Id* at 291. Although the plaintiffs in *G.O.A.L.* did not prevail on a number of claims, that did not preclude their entitlement to fees under the Fees Act. *Id.* at 293.[6]

Amici's arguments, like Mr. Parmelee's, fail because Mr. Parmelee is not automatically entitled to attorney fees. Here, the Court of Appeals has only overturned a CR 12(c)[7] dismissal, while making it clear the Department retains the authority to prohibit and infract the conduct that originally led to these disciplinary proceedings. Consequently, the cases cited by amici do not support their contentions. *See* Brief of Amici at 3 (citing *American Broadcasting Co*, (attorney fees ordered by appellate court after determining civil rights violation and upholding decision on merits in district court); and *Ermine v. Spokane*, 143 Wash. 2d 636, 23 P.3d 492 (2001) (attorney fees were appropriate where the plaintiff was able to prove the elements of his 42 U.S.C. §1983 claim at the trial court)).[8]

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[6] Quoting *Texas State Teachers v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790, 109 S. Ct. 1486, 103 L.Ed.2d 866 (1989) (a non-prisoner case cited in Brief of Amici at 5, 8) (attorney fees sought on determination by district court that teacher's First Amendment rights were violated among other unsuccessful claims).

[7] The standard to dismiss a complaint pursuant to CR 12 (b)(6) and CR 12 (c) is the same and the cases regarding either are referenced. *Stevens v. Murphy*, 69 Wash. 2d 939, 941, 421 P.2d 668, 670 (1966) *overruled on other grounds, Merrick v. Sutterlin*, 93 Wash. 2d 411, 610 P.2d 891 (1980).

[8] All of the remaining fees cases cited by amici in support of their argument for presumptive entitlement to attorney fees under 42 U.S.C. §1988 are non-prisoner cases.

The Department did not contend that Mr. Parmelee must prevail on all of his claims in order to qualify for attorney fees in a civil rights case, contrary to the arguments of amici. Brief of Amici at 6. Here, the Court of Appeals reversed the superior court's dismissal order remanding the matter and allowing Mr. Parmelee to proceed on his claims of retaliation, violation of due process, and free speech. *Parmelee*, 145 Wn. App. at 223. Regardless of the Court of Appeals' reference regarding fees to Mr. Parmelee's retaliation claim (*see* Brief of Amici at 7, n. 3 (referencing 145 Wn. App. at 249)), the Court of Appeals clearly remanded his other claims as well, without determining his rights were violated on those claims. If the superior court later determines that his constitutional rights were violated on his claims, Mr. Parmelee may seek attorneys fees under 42 U.S.C. §1997e(d)(1)(A).

However, consistent with the Court of Appeals decision, all of the cases cited consistently held that the claimant must prevail on the merits of their civil rights claim. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (requiring judgment on the merits of claims or court-ordered consent decree, rejecting the catalyst theory); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (claim of attorney fees based on determination that the constitutional rights of state hospital residents were violated on some of their claims); *Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (attorney fees awarded following successful judgment in school desegregation case); and *N.Y. State Nat'l Org. for Women v. Terry*, 159 F.3d 86 (2d Cir. 1988) (awarding attorney fees following contempt finding against health clinic protestors). Although the court awarded fees without an underlying judgment or consent decree in *Williams v. Hanover Housing Auth*, 113 F.3d 1294, 1300 (1st Cir. 1997), the fees were based on a catalyst theory later rejected by the Supreme Court in *Buckhannon*.

III. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Response to the Petition for Review, The Respondents respectfully request that Mr. Parmelee's Petition for Review be Denied.

RESPECTFULLY SUBMITTED this 30th day of January, 2009.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the **RESPONDENTS' RESPONSE TO BRIEF OF AMICI AMERICAN CIVIL LIBERTIES UNION, COLUMBIA LEGAL SERVICES, NORTHWEST WOMEN'S LAW CENTER, AND UNIVERSITY LEGAL ASSISTANCE** on all parties or their counsel of record as follows:

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EXECUTED this 30th day of January, 2009 at Olympia, WA.

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KAREN THOMPSON

APPENDIX A

APPENDIX

42 U.S.C. § 1997e(d) states:

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that -

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.